Filed 4/19/19 Oak Glen Christian Conference Center, LLC v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OAK GLEN CHRISTIAN CONFERENCE CENTER, LLC,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

LYSANNE RYAN,

Real Party in Interest.

E071868

(Super.Ct.No. CIVDS1619816)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate and/or prohibition. Keith D. Davis, Judge. Petition is granted in part; denied in part.

Manning & Kass, Ellrod, Ramirez, Trester, Laddell Hulet Muhlstein, Al. M. De La Cruz, and Tonya N. Mora, for Petitioner.

No appearance for Respondent.

Abramson Labor Group, Jeremy Levy, for Real Party in Interest.

I.

INTRODUCTION

This matter involves a lawsuit filed by Lysanne Ryan (real party in interest, hereafter real party) against Oak Glen Christian Conference Center, LLC (petitioners) and others arising from real party's termination from employment for failing to report after a serious illness. Petitioner filed a motion for summary adjudication as to 11 separate issues raised by the complaint. On November 9, 2018, the trial court denied the motion in its entirety, and petitioner sought relief from this court through a petition for writ of mandate.

We have reviewed and considered the petition and the record, as well as real party's informal response and petitioner's reply. The record demonstrates sufficient issues of material fact to support the trial court's denial of summary adjudication as to issues 1, 3, 5, 6, 7, 8, 9, 10, and 11 of the motion. However, we have determined that petitioner is entitled to summary adjudication as to issues 2 and 4 based on the application of settled principles of law. Therefore, we will issue a peremptory writ in the first instance directing the trial court to grant summary adjudication as to those two issues. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

II.

STATEMENT OF FACTS

Petitioner operates Oak Glen Christian Conference Center (Oak Glen), a retreat in Yucaipa, California. Originally owned by the Free Methodist Church, Oak Glen and

some of its assets were sold in December 2015 to a group of 50 churches formed into a non-profit religious organization called the Southern California Blending Center, Inc. (the Blending Center). Petitioner leased the property from the Blending Center. Petitioner has five to six full-time employees, and about 30 part-time and seasonal employees. The Free Methodist Church had more than 50 employees.

Real party accepted a position as guest services manager at Oak Glen in early 2015 when it was owned by the Free Methodist Church. Her employment agreement was with Oak Glen, not the Free Methodist Church. Her job involved assisting the camp director, Jerome Winn (Winn), in a very busy office. Winn was real party's direct supervisor.

Real party moved from out of state to on-site Oak Glen housing in February 2015. She began working at Oak Glen on March 9, 2015. After her 90-day probation period had ended, real party began asking Winn about health insurance. Winn told her the owners were in the process of selling the property, and he was working on getting petitioner to pay for her health insurance after the camp was sold. On December 22, 2015, Ryan and the other employees received an email from Winn stating that their employment with the Free Methodist Church was terminated. Through the same email, they were offered continued employment through petitioner. Real party accepted and continued with the same duties working for Winn, although they were both now employed through petitioner.

Real party was an at-will employee. Petitioner's employee handbook states: " 'Voluntary termination results when an employee . . . fails to report to work for three consecutively scheduled work days without notice to and approval by his or her supervisor.' " On March 20, 2016, real party suffered a hypertensive emergency for which she sought medical care. She notified Winn that her doctor directed her to take a week off of work, but offered to come in for a few hours depending on how she felt. Winn replied that he needed a doctor's note specifically indicating how much time off real party needed, and that he did not want real party returning to work without a medical clearance. On March 22, 2016, real party suggested that she could perform some tasks from home. However, Winn denied the request, and again requested a doctor's note and medical clearance.

Real party produced a doctor's note excusing her from work until March 28, 2016. She was subsequently diagnosed with a rare autoimmune disease which required chemotherapy and steroid treatment, requiring her to take more time off of work. Real party produced another note from her doctor on or about April 21, 2016, stating she would not be able to return to work until May 21, 2016. Because she lived on-site and less than 300 yards from the office, real party again asked Winn if she could work from home part-time during her illness answering phones and responding to emails. Winn again denied the request, insisting that the job required that she be in the office to respond to client needs.

Initially, real party kept Winn apprised of her condition. However, after April 24, 2016, over a month passed without real party contacting Winn. Although the note from real party's doctor only authorized leave up through May 21, 2016, and her scheduled work days were typically Tuesday through Saturday, she did not report to work on Saturday, May 21, 2016, or on the following Tuesday or Wednesday. On May 25, 2016, real party received a letter from Winn via email terminating her for abandoning her position. She later produced a doctor's note dated May 25, 2016, excusing her from work until June 30, 2016.

During real party's absence, Winn relied on 19-year-old female part-time employee Jess Aguilar, as well as another younger employee, Katie Carlson, to help in guest services. Both Aguilar and Carlson were lifeguards who also worked in housekeeping, helped in the kitchen, and ran the challenge course. Winn overtly favored Aguilar. He bought her boots in the winter and let her live on-site despite denying camp housing to other full-time employees. Winn claimed that he felt sorry for Aguilar because she came from a troubled background. After real party was terminated, Winn asked Aguilar and Carlson to help him run the office on a part-time basis while petitioner searched for a permanent replacement. In September 2016, Julie Cagle was hired full-time in the guest services position. Cagle was a year older than real party.

In November 2016, real party filed a lawsuit against petitioner, Winn, and the Free Methodist Church alleging various violations of the Fair Employment and Housing Act (FEHA), Labor Code, Business and Professions Code section 17200, and the California

Family Rights Act (CFRA), and claiming emotional distress in addition to other damages. Petitioner moved for summary adjudication, raising 11 issues. The trial court rejected each of petitioner's arguments and denied the motion in its entirety.

On December 27, 2018, petitioner filed its petition for writ of mandate, prohibition or other appropriate relief in this court, and requested an immediate stay of proceedings. We issued a stay and invited real party to file an informal response specifically addressing three of the 11 issues raised in petitioner's motion for summary adjudication, including: (1) whether petitioner can be held liable for violations of the CFRA (issue 2); (2) whether there was evidence that petitioner discriminated against real party on the basis of her age (issue 4); and, (3) whether petitioner could be found to have violated Labor Code section 970 under a theory of successorship liability (issue 9). Real party filed an informal response on February 21, 2019, and petitioner replied on March 13, 2019.

Based on our review of the record in this matter, as well as applicable law and arguments presented by the parties, we find triable issues of fact exist as to all but two of the 11 issues raised in petitioner's motion for summary adjudication. As such, the petition is summarily denied as to those nine issues without further discussion. We now proceed to the two remaining issues.

III.

DISCUSSION

As a threshold matter, a party is authorized by statute to challenge the denial of a motion for summary judgment or summary adjudication by filing a writ petition in a reviewing court within 20 days after service of the trial court's entry of order. (Code Civ. Proc., § 437c, subd. (m)(1).) In this case, the trial court signed petitioner's proposed order on December 12, 2018, and notice of ruling was served by mail on December 20, 2018. The petition was therefore timely filed on December 27, 2018.

Petitioner argues that the trial court erred in denying each issue in its motion for summary adjudication. "Summary adjudication motions are 'procedurally identical' to summary judgment motions." (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860 (*Serri*).) Summary judgment may only be granted when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.) All doubts must be resolved in favor of the party opposing summary judgment. (*Riley v. Southwest Marine* (1988) 203 Cal.App.3d 1242, 1248.) This court reviews summary judgment rulings de novo. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81.)

A. Issue 2: Petitioner Is Not Liable Under the CFRA as a Matter of Law

In her complaint, real party asserts a cause of action against petitioner and the other defendants for violation of the CFRA. Petitioner contends that it cannot be liable

under the CFRA because, among other things, it did not have more than 50 employees during any relevant period. We agree.

The CFRA requires persons or entities meeting the statutory definition of employer to provide up to 12 weeks of unpaid medical leave to employees with more than 12 months of service with the employer. (Gov. Code § 12945.2, subd. (a).) An employer is defined as "[a]ny person who directly employs 50 or more persons to perform services for a wage or salary." (Gov. Code § 12945.2, subd. (c)(2)(A).) It is undisputed that petitioner had fewer than 50 employees at all relevant times, so by definition it does not qualify as an employer under the CFRA.

Despite petitioner's failure to meet the statutory definition of employer, real party contends that petitioner is still liable for violating the CFRA as a successor to Free Methodist Church, which had more than 50 employees. Successor liability is an exception to the general rule that a successor corporation is not subject to its predecessor's liabilities. (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 25.) The doctrine has been narrowly construed in California, but California courts have yet to address it in the context of labor or employment law. When it has been applied in federal court, successorship liability has been evaluated more broadly in the context of employment and labor law than in other areas of corporate law. (See *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc.* (2015) 801 F.3d 1079, 1090, 1099.) Federal courts have imputed successor liability in cases involving

violations of the National Labor Relations Act, Fair Labor Standards Act, Title VII of the Civil Rights Act, and the Family and Medical Leave Act (FMLA). (*Id.* at p. 1090.)

Nonetheless, there is no legal support for imputing CFRA's statutory requirement of having 50 employees on a successor employer to establish liability for a predecessor's violation of the statute. Contrary to real party's contention, *Sullivan v. Dollar Tree Stores, Inc.* (2010) 623 F.3d 770 does not provide a basis for defining petitioner as an employer under the CFRA. *Sullivan* actually rejected application of the federal successor in interest doctrine in large part based on a failure of the employees to meet the statutory requirements for eligibility under the FMLA. (See *Id*. at p. 787; see also *Clifton v. MARS Telecom, Inc.* (D. Kan., Mar. 5, 1996, No. 95-2364-JWL) 1996 U.S. Dist. LEXIS 4250, at *8-9 [In Title VII case, "employees and sales representatives may not be counted for purposes of meeting [successor's] jurisdictional requirements . . ."].) Thus, we find that petitioner cannot be held liable for purported violations of the CFRA under a theory of successor liability.

Real party also asserts that petitioner should be equitably estopped from contesting her eligibility under the CFRA because petitioner induced her to rely on its representation that she was eligible as a qualified employee under the CFRA. "[E]stoppel requires reasonable reliance on a misleading communication upon which the victim was intended to rely." (*Warner Bros. Int'l Television Distribution v. Golden Channels & Co.* (9th Cir. 2008) 522 F.3d 1060, 1069, citing *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 244-245; see *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

We have found no Ninth Circuit or California case imputing FMLA or CFRA liability based on estoppel. Rather, one federal court from the Eastern District of California has refused to impose such liability in a case with facts analogous to this one. In *Manser v. Sierra Foothills Public Utility Dist.* (E.D. Cal., Sept. 7, 2010, No. CV-F-08-1250, 2010 U.S. Dist. LEXIS 98985, at *11, an employee notified her employer that she was in the emergency room with a rib and back injury and was unable to work her shift. She was told to take as much time as she needed, and to inform her employer when she was ready to return to work. Shortly thereafter, the plaintiff was terminated. (U.S. Dist. LEXIS 98985 *Id*. at *1-2.) After trial, the plaintiff moved for a finding in equity that her employer should be estopped from denying her FMLA/CFRA eligibility. She argued that she relied to her detriment on language in the company's personnel manual, as well as her employer's silence after she gave notice of her disability. The court rejected the argument, because the plaintiff offered no evidence that she relied upon any specific policy regarding her eligibility for leave. Moreover, the court found no evidence that the plaintiff was misled or changed her position based upon a belief that she was an eligible employee. (U.S. Dist. LEXIS 98985 LEXIS *Id*. at *6-7.) Similar to the *Manser* plaintiff, real party presents no evidence that she detrimentally relied upon any representations by petitioner that she was eligible for CFRA leave. Petitioner's employee manual states, in relevant part: " 'In addition to the paid sick leave described above, an employee may be eligible for a leave of absence under the California Family Rights Act, as amended, or the

federal Family and Medical Leave Act of 1993, as amended. You should contact your supervisor regarding your eligibility for a leave of absence.' "

This language does not amount to a representation of eligibility under the CFRA/FMLA, and a reasonable person could not have construed it as such given the use of the term "may be eligible" and the express instruction to employees to speak with a supervisor to determine whether they are eligible for statutory leave. In addition, real party offers no testimony that she changed her position based on a belief that she was entitled to CFRA leave. Winn never indicated to real party that she was eligible for CFRA leave. Instead, he continued to request that she provide him with certification from her doctors to support her requested time off, and he refused her request to work from home. All of these facts weigh against the implication that Winn led real party to believe her leave was granted pursuant to the CFRA.

Moreover, real party's April 21, 2016 doctor's note said she could return to work on May 21, 2016. As of May 25, 2016, real party had not spoken with Winn since April 24, and she failed to provide Winn with the requested doctor's note until after she had been terminated on May 25, 2016. Under these facts, equity does not weigh in favor of estoppel. We are not persuaded to the contrary by the case cited by real party, *Jadwin v. County of Kern* (E.D. Cal. 2009) 610 F.Supp.2d 1129. Unlike this case, *Jadwin* involved an employer subject to the FMLA, which had expressly authorized FMLA leave in writing. (*Id.* at p. 1164.) In contrast,

petitioner was not subject to the CFRA, and it made no representations to real party that her leave was granted pursuant to the CFRA. Thus, real party has not established a basis for imposing CFRA liability onto petitioner, and petitioner is entitled to summary adjudication on this issue as a matter of law.

B. Issue 4: There Is No Genuine Issue of Fact Demonstrating That Petitioner Discriminated Against Real Party on the Basis of Her Age

Real party also raises a claim of age discrimination under California's FEHA, Government Code sections 12900, et seq., because she was purportedly replaced by 19-year-old Aguilar after she went on medical leave. Government Code section 12940, subdivision (a), makes it unlawful for an employer to discriminate against any person on any protected basis, including age. (Gov. Code, § 12940, subd. (a).) For purposes of age discrimination, any individual over 40 years of age is among the protected class. (Cal. Code Regs., tit. 2, § 11074, subd. (a).)

In analyzing FEHA discrimination claims, California courts have adopted the three-stage, burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 354 (*Guz*).) First, a plaintiff must state a prima facie case for age discrimination by (1) demonstrating that at the time of the adverse action he or she was 40 years of age or older; (2) he or she was satisfactorily performing his or her job; (3) an adverse employment action was taken against him or her; and (4) some other circumstance suggesting a discriminatory motive was present, such as replacement by a significantly younger worker with similar

qualifications. (*Id.* at p. 355.) Once such a showing is made, it raises a presumption of discrimination.

A defendant may overcome this presumption by articulating a non-discriminatory reason for discharging the employee. (*Guz, supra*, 24 Cal.4th at pp. 355-356.) When such a reason is stated, the burden then shifts back to the plaintiff to present evidence which supports "a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Id.* at p. 361.) An employer who cites a legitimate reason for terminating the employee is entitled to summary judgment unless the employee presents substantial evidence that the employer's stated reasons for terminating the employee " 'were implausible, or inconsistent or baseless.' " (*Serri, supra*, 226 Cal.App.4th at p. 866; see *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) Where the same individuals were responsible for the hiring and firing of the plaintiff, it creates a strong inference against a discriminatory motive. *(Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809.)

Here, there is no dispute that real party, who was 57 at the time of her discharge, met the age requirement for a FEHA claim, and that an adverse action was taken against her. However, real party has not made a credible showing that petitioner had a discriminatory motive. Petitioner contends that real party's termination was based on her failure to contact Winn for a month or report to work within three work days of the date of her doctor's release. The fact that Aguilar and Carlson were asked to work in the

office in real party's absence does not suggest petitioner had a discriminatory intent. Aguilar and Carlson were the part-time employees who filled in for real party during her absence and were not performing all of real party's duties. The evidence shows that Winn undertook many of real party's responsibilities until a suitable permanent replacement could be found. There is also no evidence that either Aguilar or Carlson had qualifications similar to real party's. They worked as lifeguards, as well as in housekeeping, the kitchen, and the challenge course. Real party therefore has not demonstrated that petitioner's non-discriminatory reasons for termination were a pretext.

Real party's claim is further undercut by the fact that her full-time replacement, Cagle, was a year older than her. In addition, Winn was involved in initially hiring real party, as well as terminating her, and both Anthony Jacobson and Craig Birchler, executives of petitioner, made the decision to hire real party on December 22, 2015, and discharge her on May 25, 2016. Thus, the presumption against discriminatory intent weighs strongly in petitioner's favor. Because there is insufficient evidence to support a rational inference that petitioner intentionally discriminated against real party based on her age, petitioner is entitled to summary adjudication as to this issue.

IV.

DISPOSITION

Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order of November 9, 2018, in San Bernardino Superior Court case No. CIVDS1619816, denying petitioner's motion for summary adjudication of

issues in its entirety, and to enter a new and different order granting the motion as to issues 2 and 4, and denying it as to all other issues.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

The stay previously ordered by this court is lifted upon imposition of the consistent order in the superior court. The parties to bear their own costs.

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RAMIREZ
P. J.

We concur:

FIELDS
J.

RAPHAEL
J.